

STATE OF MICHIGAN
IN THE SUPREME COURT

CAROL DRAKE and CLELLEN BURY,

Plaintiffs-Appellants,

v

CITY OF BENTON HARBOR and HARBOR
SHORES COMMUNITY REDEVELOPMENT
CORPORATION,

Defendants-Appellees.

Supreme Court No. 140685

Court of Appeals No. 287502

Berrien Circuit Court No. 2008-000247-CE

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL BILL SCHUETTE
IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL
(IN SUPPORT OF THE CITY OF BENTON HARBOR AND
HARBOR SHORES COMMUNITY REDEVELOPMENT CORPORATION)

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Dated: January 20, 2011

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STATEMENT OF QUESTION¹

May the City of Benton Harbor lease a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corporation to develop 3 holes of a proposed 18-hole championship Jack Nicklaus golf course, without violating the restrictions set forth in the 1917 deed?

Appellants' answer: "No."

Appellees' answer: "Yes."

Attorney General's answer: "Yes."

¹ The Attorney General was not a party to this litigation or the January 27, 2004, Consent Judgment and, therefore, addresses only the first issue identified by the Court in its Order of September 15, 2010.

INTRODUCTION

The Attorney General submits this *Amicus Curiae* Brief in support of Defendants-Appellees.

The Attorney General is the state official responsible for oversight of charitable gifts and trusts and carries out this role through his Charitable Trust Section.² In particular, the Charitable Gifts Act authorizes the Attorney General to initiate legal proceedings to enforce the terms of charitable gifts, devises, and trusts "so that the intentions of the creator thereof shall be carried out whenever possible."³ In addition, the Supervision of Trustees for Charitable Purposes Act authorizes the Attorney General to conduct investigations of transactions involving charitable assets⁴ and to enforce charitable trusts by appropriate proceedings.⁵

The Attorney General, in his capacity as Michigan's charity official, was not a party to the litigation below regarding the compatibility of the proposed uses of Jean Klock Park (Park) with restrictions contained in the 1917 Deed of Gift (Deed) to Benton Harbor and its assigns from donors J.N. and Carrie Klock (Donors). The Attorney General's Charitable Trust Section had extensive non-judicial involvement, including discussions with many parties and close review of Park use proposals submitted by Defendants-Appellees City of Benton Harbor (Benton Harbor) and Harbor Shores Community Redevelopment, Inc. (Harbor Shores). Thus, the Attorney General is familiar with the issues before this Court.

² The Attorney General's Charitable Trust Section administers or enforces several acts designed to protect charitable assets and the intentions of charitable donors. These include the Supervision of Trustees for Charitable Purposes Act, MCL 14.251 *et seq*; the Charitable Organizations and Solicitations Act, MCL 400.271 *et seq*; the Charitable Gifts Act, MCL 554.351 *et seq*; the Charitable Trustees Powers Act, MCL 14.271 *et seq*; and the Uniform Prudent Management of Institutional Funds Act, MCL 451.921 *et seq*.

³ MCL 554.352.

⁴ MCL 14.258; 14.259; 14.261.

⁵ MCL 14.261.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General adopts the counter-statements of facts contained in the Response Briefs of Defendants-Appellees Benton Harbor and Harbor Shores and supplements those statements with the following additional facts.

The Charitable Trust Section reviewed the planned use of municipal parkland to determine whether Benton Harbor's proposal was consistent with the intentions expressed by the Donors in their 1917 Deed to Benton Harbor.

The Charitable Trust Section held extensive discussions with representatives of Harbor Shores and the City, as well as representatives of groups opposing the proposed lease of a portion of Jean Klock Park for use as part of a public golf course. After reviewing the terms of the Deed and two lease agreements – the Lease Agreement and Park Improvements and Maintenance Agreement (Agreements) between Benton Harbor and Harbor Shores – the Charitable Trust Section concluded that the final version of the Agreements were consistent with, and protective of, the Donors' intentions. The Charitable Trust Section's reasoning is explained in the Charitable Trust Section's letter of June 4, 2008, to Don Schmidt, counsel for Benton Harbor (Exhibit 1).

ARGUMENT

I. The City of Benton Harbor did not violate the restrictions in the 1917 Deed conveying the property comprising Jean Klock Park to Benton Harbor when it leased a portion of Park property to Harbor Shores Community Redevelopment Corporation to develop 3 holes of a proposed public golf course.

A. Standard for Granting Leave to Appeal

The Attorney General adopts the positions contained in the Response Briefs of Benton Harbor and Harbor Shores.

B. Analysis

The narrow concern of the Charitable Trust Section in this matter was to determine whether the planned use of municipal parkland was consistent with the expressed intentions of the Donors. Upon review, the Charitable Trust Section concluded that the final proposal was consistent with the Donors' intentions as expressed in the Deed.

The Charitable Trust Section's observations and conclusions are set forth in two letters (Exhibit 1).⁶ In the Charitable Trust Section's letter of June 4, 2008, to counsel for Benton Harbor, the Charitable Trust Section emphasized certain aspects of the final proposal and concluded that the proposed use was consistent with the Donors' restrictions; in its prior letter of September 14, 2007, to the City Manager of Benton Harbor, the Charitable Trust Section concluded that the proposed use would serve a public purpose as a public park.

The Attorney General agrees with Benton Harbor and Harbor Shores that the final proposal, including the Agreements, comports with the Donors' directives. The Attorney General places particular emphasis on the following factors:

⁶ The Charitable Trust Section's letter of June 4, 2008, attached the prior letter of September 14, 2007, as an attachment. The complete correspondence of June 4, 2008, thus contains both letters and is therefore included with this Brief as a single exhibit.

- The City has established reasonable rules and regulations concerning the use of the Park area in question that promote public use both during golf season and in the off-season;
- The lease provides for revenue from the golf course to be used for public purposes;
- The City has retained substantial oversight authority, ownership, and ultimate control of the property; and
- The parties have committed themselves to adhere to the Donors' restrictions.

Finally, it is important to note that not only Benton Harbor, but also the Attorney General, may undertake legal action if Harbor Shores fails to observe its commitment to observe the Donors' restrictions on the use of the property.

RELIEF SOUGHT

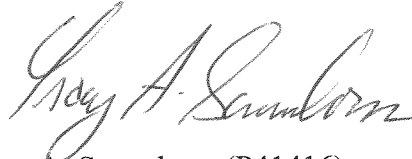
The Court of Appeals' unpublished opinion was correct in both analysis and result. While this case does present a significant issue in litigation against a state subdivision, MCR 7.302(B), there is no compelling reason for this Court to devote its resources to a full review of an unpublished Court of Appeals opinion that is manifestly sound.

Therefore, this Court should deny the application for leave to appeal.

Respectfully submitted,

Bill Schuette
Attorney General

B. Eric Restuccia (P49550)
Solicitor General
Counsel of Record



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Dated: January 20, 2011

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30214
LANSING, MICHIGAN 48909

June 4, 2008

Don M. Schmidt
Attorney for the City of Benton Harbor
Miller, Canfield, Paddock and Stone, P.L.C.
277 South Rose Street
Kalamazoo, MI 49007

Dear Mr. Schmidt:

RE: City of Benton Harbor's Proposed Lease of a Portion of Jean Klock Park

The City of Benton Harbor ("City") has asked the Attorney General's Charitable Trust Section to consider whether a proposal by the City to lease a portion of Jean Klock Park ("Park") for use as part of a golf course to Harbor Shores Community Redevelopment Inc. ("Lessee"), a charitable Michigan nonprofit corporation, is consistent with the terms of the deed conveying the Park to the City. The City's proposal includes two agreements: the Park Improvement and Maintenance Agreement and the Harbor Shores Lease Agreement ("Agreements").

The land on which the Park is located is subject to restrictive conditions imposed by J. N. and Carrie Klock, who donated the land to the City in 1917. Through the deed conveying the property ("Deed"), the Klocks required the City and its assigns:

- To use the land for a bathing beach, park purposes, or other public purposes;
- To keep the property open for the use and benefit of the public, subject only to such rules and regulations as the City of Benton Harbor may make and adopt; and
- To prohibit the manufacture and distribution of alcoholic beverages on the property.

Both parties to the lease have explicitly acknowledged and affirmed their continuing obligation to obey these restrictions. The Lease Agreement states:

Harbor Shores and the City of Benton Harbor shall not use, allow, or cause the portion of the Leased Premises located on Jean Klock Park to violate the terms of the Deed, including, without limitation, that such portions of the Leased Premises shall be used for bathing beach, park purposes, or other public purposes; and at all times be open for the use and benefit of the public, subject only to such rules and regulations as the City of Benton Harbor may make and adopt. Harbor Shores shall not allow, suffer, or permit any intoxicating liquors or drinks to be manufactured, sold, or given away upon Jean Klock Park.

The parties having bound themselves to adhere to the conditions of use imposed by the Klocks, the Charitable Trust Section concludes that the Lease Agreement is consistent with the terms of the Deed.

Other features of the Agreements merit comment.

By way of background, the City proposes to permit the leased area to be used as three holes of a public golf course that is planned to extend beyond the boundaries of the Park. The course is a prominent feature in an extensive development plan designed to stimulate the economy in City of Benton Harbor and Berrien County. Much of the plan, including construction of the golf course, will be supported by the work and resources of several charitable organizations in the community. The charitable assistance is expected to include an initial contribution of approximately \$18,000,000 by Lessee that will be used to finance construction of the course and park improvements. The parties hope and expect the project, including the use of the proposed leased portion of Jean Klock Park, to benefit the public. Surplus revenue from the golf course will be used exclusively to fund two community benefits programs, one for the City and its residents, and the other for City of Benton Harbor, St. Joseph, and Berrien County.

In our correspondence of September 14, 2007 (attached as an exhibit to this letter for your reference), we emphasized certain important components of the City's proposal as it related to the Park. These included: permitting public access to all areas of the park, including the public golf course; enhancing accessibility for the disabled to the Park areas, including the waterfront area; and providing for improvements and ongoing maintenance of the Park. We specifically addressed the City's proposal to establish a Golf Course Oversight Panel ("Panel"). We recommended that the Panel be able to: ensure public access to the golf course through the adoption of reasonable fee structures; encourage public use of the park land on which the course is located during the off-season; and ensure that the park remains open and inviting to all persons and, in specific, encourage park access by disabled persons to the greatest extent possible.

The Agreements reflect the parties' consideration of our concerns. In addition to promising to comply with the terms of the Klocks' gift to the City, the parties have agreed to:

1. Create a Golf Course Oversight Panel with the following features:
 - a. It will be created by and act on behalf of the City;
 - b. The three voting members will consist of two City Commissioners and one additional City employee, all selected by the City;
 - c. It will be subject to Michigan's Open Meetings and Freedom of Information Act; and
 - d. It will have the authority to approve or reject proposed fee schedules, which must incorporate discounted rates for local residents.
2. Provide for off-season access to most of the leased area for recreational uses other than golf, including cross-country skiing;
3. Provide access to the course during the golfing season by school and youth programs;
4. Provide maintenance by the Lessee of the entire Park and additional parkland beyond the borders of the Park at no cost to the City; and
5. Allow a range of remedies to the City, including termination of the lease, in the event of a violation of the agreement, which would include a violation of the terms of the Deed.

Don M. Schmidt
Attorney for the City of Benton Harbor
Page 3
June 4, 2008

In conclusion, the Charitable Trust Section finds that the Agreements mandate obedience to, and are consistent with, the restrictions expressed by the Klocks in their Deed to the City. The Agreements do not change the conclusion expressed in our letter of September 14, 2007, that the City's proposal for the portion of Jean Klock Park under consideration is for a public purpose and subject to the rules and regulations of the City of Benton Harbor.

Note – This is a division-level communication from the Charitable Trust Section and is not a formal opinion of the Attorney General.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Tracy A. Sonneborn". The signature is fluid and cursive, with the first name "Tracy" being more prominent.

Tracy A. Sonneborn
Assistant Attorney General
Consumer Protection Division
Charitable Trust Section

EXHIBIT

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30213
LANSING, MICHIGAN 48909

September 14, 2007

Dwight P. Mitchell
City Manager
Benton Harbor City Hall
200 East Wall Street
Benton Harbor, Michigan 49022

Mark Mitchell
The Alliance for World Class Communities
38 West Wall Street
Benton Harbor, Michigan 49022

Dear Gentlemen:

Re: Jean Klock Park

In the past months, the Attorney General's Charitable Trust Section has reviewed aspects of the Harbor Shores Golf Course Agreement ("Agreement") relating to Jean Klock Park, which is located on land given to the City of Benton Harbor ("City") in 1917 by J. N. and Carrie Klock. The extensive information provided by the City and Harbor Shores, together with discussions with counsel for these parties as well as with staff members of the Michigan Department of Natural Resources, has been helpful to us in understanding the proposed transaction.

The information presented to us, including summaries of related transactions, plans, agreements, and other legal documents, establishes that substantial efforts have been, and will continue to be, directed toward increasing access to and use of Jean Klock Park by the public. This effort includes, but is not limited to: permitting public access to all areas of the park, including the public golf course; enhancing accessibility for the disabled to all areas, including the waterfront; and expending surplus revenue from the operation of the planned golf course for maintenance and improvement of the entire park.

In particular, the Charitable Trust Section understands that the City and Harbor Shores planners intend to meet in the near future with the members of the Oversight Panel referred to in the Agreement. In our view, it is important for the Oversight Panel to adopt rules and procedures to ensure that it fulfills its duties that are described in Exhibit A to the Agreement, embodied in the deed of gift from the donors of Jean Klock Park, or mandated by the Department of Natural Resources and U.S. Park Service.

Mr. Dwight P. Mitchell
Mr. Mark Mitchell
Page 2
September 14, 2007

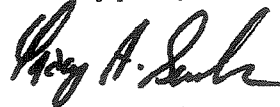
We believe that the Oversight Panel's rules and procedures should include, but should not be limited to, provisions that:

- ensure public access to the golf course through the adoption of reasonable fee structures;
- encourage public use of the park land on which the course is located during the off-season;
- ensure that the park remains open and inviting to all persons and, in specific, enable park access by disabled persons to the greatest extent possible;
- establish a procedure for reviewing maintenance and improvement activity and, if necessary, taking steps to correct any deficiencies;
- facilitate feedback from the public and address the handling of inquiries and complaints regarding park use;
- require open meetings of the Oversight Panel; and
- set forth special procedures, including an opportunity for notice, review and approval by the Charitable Trust Section and public comment, before any change to the terms of the articles, rules, and procedures.

As the process of drafting the Oversight Panel's rules and procedures progresses, we will be happy to address specific questions or offer more detailed comments.

On the basis of our favorable review and consideration of the information we have received (subject to our review and approval of the Oversight Panel's rules and procedures), the Charitable Trust Section believes that the proposed use of a portion of Jean Klock Park as part of a larger public golf course serves a public purpose as a public park. We look forward to updates from the City, Harbor Shores, and the Oversight Panel as they finalize the project's planning and financing phase and progress toward construction.

Sincerely yours,



Tracy A. Sonneborn
Assistant Attorney General
Consumer Protection Division
Charitable Trust Section
Tel: (517) 373-1152
Fax: (517) 241-0229

TAS:alm

c: Charlotte Pugh Tall, City Attorney
Geoffrey Fields, Esq.

S:\Consumer Protection\Correspondence\Sonneborn\T\2007\Letters\09-14-07 KlockPark Mitchell